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No. 86-1994

In The

Supreme Court of the United States

October Term, 1986

VERDEGAAL BROTHERS, INC.,
WILLIAM VERDEGAAL, and
GEORGE VERDEGAAL,
Petitioners,

vs.

UNION OIL COMPANY OF CALIFORNIA and
BREA AGRICULTURAL SERVICES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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RULE 28.1: LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES.

The Respondents in the case are Union Oil Company of California, a corporation, and Brea Agricultural Services, Inc.

Union Oil Company of California is a wholly-owned subsidiary of Unocal Corporation, a Delaware corporation whose stock is publicly traded. Brea Agricultural Services, Inc. is a majority-owned subsidiary of Unocal Corporation, the remaining minority interest being owned by Robert J. Newell, an individual.

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Respondents Union Oil Company of California and Brea Agricultural Services, Inc., referred to as "Union Oil" herein, respectfully submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals For the Federal Circuit submitted by petitioners Verdegaal Brothers, Inc., William Verdegaal and George Verdegaal, referred to as "Verdegaal" herein.

COUNTER-STATEMENT OF THE CASE

There are inaccuracies and omissions in Verdegaal's Statement of the Case, as well as in the factual postulates of its Question Presented, which require correction.[1]

The patent in suit, Patent No. 4,310,343 ("Verdegaal patent" herein) claims a process for making certain urea-sulfuric acid liquid fertilizer products. The chemical reaction between urea and sulfuric acid is exothermic, i.e., it gives off heat. The claims of the Verdegaal patent call for the addition in amounts specified therein of water, urea and sulfuric acid to "a non-reactive nutritive heat sink" (claim 1). In claim 2, the addition of those ingredients is more specifically described as "recycled liquid fertilizer", i.e., a batch of previously-made product.

The only example of a heat sink usuable in the claimed process given in the Verdegaal patent is a previously-made batch of the urea-sulfuric acid product. Such a batch is placed in a mixing tank to which more of the same reactants (water, urea and sulfuric acid) are added.

Throughout the trial of the case, the previously-made batch to which more of the same reactants are added was referred to by counsel and witnesses as a "heel". This term is used with the same meaning in the Verdegaal patent—"Thus by leaving a 'heel' of about 10% of the fertilizer from the previous batch in the mixing tank, the

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[1]"Ver.Pet. . . . " with pagination refers to Verdegaal's Petition. References to the opinion of the Court of Appeals for the Federal Circuit are to the opinion reported as *Verdegaal Brothers v. Union Oil Company of California, Inc.*, 814 F.2d 628 (1987).

heat is dissipated as the reaction takes place in the tank, which also act (sic), as a reaction vessel."

Patent No. 4,315,763 ("Stoller patent" herein) is entitled "High Analysis Liquid Fertilizers". The Verdegaal petition asserts to this Court, as Verdegaal also asserted to the Federal Circuit, that "The Stoller patent relates to phosphorous containing fertilizers, not the urea and sulfuric acid fertilizer of Verdegaal" (Ver.Pet. 3). This assertion is incorrect.

The Stoller patent expressly describes processes for making urea-sulfuric acid liquid fertilizer products as well as for making urea-phosphoric acid liquid fertilizer products. Example 8 of the Stoller patent (quoted in fn. 2, Ver.Pet. 3) describes a urea-sulfuric acid product virtually identical to a urea-sulfuric acid product described in the Verdegaal patent. Example 12[2] of the Stoller patent describes the application of that urea-sulfuric acid product as a fertilizer to soils.

In column 7, the Stoller patent describes the process for making urea-sulfuric acid products utilizing a heel, which process was later claimed in the Verdegaal patent. Stoller states "Once a batch of liquid product has been made, it can be used as a base for further manufacture.", and, further in the same paragraph "Leaving a heel of

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[2]Example 12 states in pertinent part—To illustrate the effect of low pH fertilizers on soil, four soils ranging in character from sandy through fine sandy loam to clay loam, were treated with a solution of urea in water. Duplicate samples of each soil were also treated with the reaction product of urea and sulfuric acid, the product of Example 8.

liquid in the vessel permits further manufacture to be conducted in a stirred fluid mass." (See fn. 3, Ver.Pet. 4).

It was upon the disclosure of the Stoller patent that the Federal Circuit based its reversal of the jury finding of validity of the Verdegaal patent. The court stated (814 F.2d at 633):

> "The pertinent issues are whether Stoller discloses the process of adding urea and sulfuric acid to a previously-made batch of product and whether that base would in fact act as a heat sink."

Contrary to the suggestion contained in Verdegaal's Question Presented, there is no fact issue involving "interpretation of a document". The district court's denials of motions for summary judgment, directed verdict and judgment notwithstanding the verdict was in each instance without any opinion whatsoever. Further, however, it was, as to the first issue, uncontradicted that the Stoller patent disclosed a process in which a heel of urea-sulfuric acid liquid fertilizer is used to make more of that same product. See 814 F.2d at 632.

As to the second issue, the Federal Circuit applied the correct standard of review to the jury's presumed finding, one implicit in the jury's verdict of validity, that the heel described by Stoller did not in fact act as a heat sink. The court concluded that such a finding was unsupported by substantial evidence and that in fact the evidence indisputably established that the heel acted as a heat sink.

SUMMARY OF ARGUMENT

In this case the Federal Circuit held that the evidence of Union Oil was so clear and convincing that reasonable jurors could only conclude that the claims of the Verdegaal patent were invalid. The court reached this conclusion after giving specific consideration to the only point as to which Verdegaal requests review in its petition—whether the heel used in the prior art Stoller process acted as a heat sink.

The Verdegaal petition does not question the correctness of the standard of review followed by the Federal Circuit. It does not question the correctness of the test for anticipation, i.e., lack of novelty, that was applied by the court below.

The petition is nothing more than an attempt to have this Court duplicate the review of the entirety of the record that was made by the Federal Circuit in reaching its decision on the above issue. Verdegaal's petition advances nothing which credibly suggests reasons of the character set forth in Rule 17 of this Court's rules. Accordingly, no review by this Court is warranted.

ARGUMENT: REASONS FOR DENYING THE PETITION

The decision of the Federal Circuit reversing the judgment entered on the jury verdict upholding claims 1, 2 and 4 of the Verdegaal patent as valid under 35 U.S.C. 102(e) does not warrant further review by this Court. The standard of review followed by the Federal Circuit and the test as to anticipation under the patent laws applied by

that court were legally correct and are not in conflict with any decision of this Court.

The Verdegaal petition is nothing more than a transparent attempt to have this Court repeat the painstaking review of the evidence which, as is manifestly evident from the Federal Circuit's opinion, was made by that court in reaching its decision. The inability of Verdegaal to point in its petition to any evidence refuting the conclusions of the Federal Circuit as to the content of the Stoller patent compellingly serves to confirm the correctness of those conclusions. Verdegaal points only to testimony directed to the same digressive arguments which were made to, and expressly rejected by, the Federal Circuit.

Verdegaal raises no question either as to the legal correctness of the standard of review applied to the jury verdict by the Federal Circuit or as to the legal correctness of the test for anticipation, i.e., lack of novelty, applied by that court. Its position boils down to its assertion that the Federal Circuit substituted "its view of a specific fact issue" for that of the jury (see Question Presented, Verdegaal petition).

Verdegaal argues: "There are only two possibilities for the inherence of the Stoller paragraphs. In fact, either Stoller's liquid left in the beaker is inherently a 'non-reactive, nutritive heat sink' provided to improve the manufacture of urea-sulfuric acid fertilizer, as recited in Claim 1 of the Verdegaal patent, or it is not." (Ver.Pet. 8). It was as to this very same argument that the Federal Circuit considered the entirety of the record before it, as it was required to do, and concluded that the issue of whether the Stoller base or heel "would in fact act as a heat sink" . . .

"could only be resolved in the affirmative." 814 F.2d at 633.

The testimony referred to on pages 3-4 of Verdegaal's petition does not in any sense bear on whether the Stoller patent anticipates the Verdegaal patent claims by reason of a disclosure of each and every element in those claims. There are no limitations in those claims as to whether sulfuric acid is added "slowly" or "rapidly". Testimony as to the rate of addition is therefore meaningless in a conideration of the patent validity issue. See 814 F.2d at 632.

The further assertion that "Stoller made no mention of a heat sink" (Ver.Pet. 4) is equally devoid of merit. The Federal Circuit specifically addressed this argument and correctly rejected it in the following terms (814 F.2d at 632-633):

> "Verdegaal raises several variations of an argument, all of which focus on the failure of Stoller to explicitly identify the heel in his process as a 'heat sink'. In essence, Verdegaal maintains that because Stoller did not recognize the 'inventive concept' that the heel functioned as a heat sink, Stoller's process cannot anticipate. *This argument is wrong as a matter of fact and law.* Verdegaal's own expert, Dr. Bahme, admitted that Stoller discussed the problem of high temperature caused by the exothermic reaction, and that the heel could function as a heat sink. In any event, Union Oil's burden of proof was limited to establishing that Stoller disclosed the same process. It did not have the additional burden of proving that Stoller recognized the heat sink capabilities of using a heel." (Emphasis added)

In *Application of Swinehart,* 439 F.2d 210, 212-213 (CCPA 1971), relied upon by the court below (814 F.2d at 633), it was held: " . . . it is elementary that the mere

recitation of a newly-discovered function or property, inherently possessed by things in the prior art, does not cause a claim drawn to those things to distinguish over the prior art.''

The Federal Circuit decided from the entirety of the record that the evidence supporting the conclusion that the heel used in the Stoller process acted as a heat sink was so clear and convincing that reasonable and fair-minded persons in the exercise of impartial judgment could only conclude that the claims of the Verdegaal patent were invalid. Verdegaal has presented in its petition nothing from the record of this case which casts any doubt on the correctness of that holding.

Apparently recognizing the absence in the record of this case of any factual support for its position, Verdegaal adverts to the alleged existence of a pattern of behavior on the part of Court of Appeals for the Federal Circuit. It avers ''It is not surprising that the Federal Circuit routinely substitutes its view of the facts for that found below, given its heritage.'' (Ver.Pet. 6). In so doing Verdegaal is without question suggesting that the Federal Circuit ''routinely substitutes its view of the facts'' for fact findings made by juries. The statement becomes all the more astonishing when it is considered that there is in Verdegaal's petition no discussion whatsoever of the substantial number of appeals from jury trials of patent cases that have been decided by the Federal Circuit.

Verdegaal's exposition of an asserted ''heritage-induced'' pattern of behavior on the part of the Federal Circuit is so lacking in substance that on its face it provides its own refutation. It gives no support to Verde-

gaal's petition and is accordingly not pursued further herein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: July 8, 1987

Respectfully submitted,

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